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No. 278

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

WALSTON A. LYNN, ET AL,

Petitioners,

versus

J. W. CARAWAY, ET AL,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioners, WALSTON A. LYNN, J. T. JORDAN, MAXCY C. LYNN, and HOUSTON B. ODOM, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled cause on July 5, 1967.

CITATION TO OPINIONS BELOW

The opinion of the United States District Court for the Western District of Louisiana appears on page 703 of the record. It is reported in 252 F. Supp. 858, and printed in Appendix "A" infra, at pages 14 to 27. The opinion of the Court of Appeals affirming the judgment of the District Court is reported in 379 F. 2d 943, and is printed on pages 28 to 30 of Appendix "A" infra. The order of the said Court of Appeals denying a rehearing and entered on April 11, 1968, is also printed on page 31 of Appendix "A" infra.

JURISDICTION

The judgment of the Court of Appeals was entered on July 5, 1967, and the opinion and decree of that court denying petitioners' rehearing was entered on April 11, 1968.

The jurisdiction of the District Court is invoked under *Securities Act of 1933*, 15 U. S. C., Sections 77a et seq, and under Title 28, § 332 of the *United States Code*, by reason of diversity of citizenship, the jurisdiction of this Court is invoked under 28 *U. S. C.* § 1254(1).

QUESTIONS PRESENTED

1. Where two parties enter into an agreement whereby First Party, owner of a 3/16 interest in a producing oil and gas lease, agrees to buy out co-owners and assign fractional interests in a mineral lease to Second Party and his nominees, and First Party uses mails to acquire interests of co-owners and to deliver assignments of fractional interests to out-of-state purchasers without any registration of lease or assignments thereof with Securities and Exchange Commission, can both parties be held civilly liable to purchasers of fractional mineral

interests under the provisions of Title I, Section 12(1) of *Securities Act of 1933*, 15 *U. S. C.* 77*l*(1), and Title I, Section 5 of said Act, 15 *U. S. C.* 77e?

2. In the above case is not the First Party by virtue of his title to the unregistered mineral interests, and his assignment of same direct to the buyers secured by Second Party, liable to the purchasers of such fractional mineral interests as an issuer of unregistered securities in view of the definition of "issuer" contained in Section 2(4) of the Securities Act, 15 U. S. C. 77b(4) and the liability provided for in Title I, Section 12, of the *Securities Act*, 15 *U. S. C.* 77*l*?

3. Is not First Party in above case an "underwriter" as defined in Title I, Section 2, of the *Securities Act*, 15 *U. S. C.* 77b(11) by virtue of his participation in the undertaking, and the distribution of said fractional unregistered mineral interests to interstate purchasers, and as such is he not civilly liable to said purchasers under the provisions of Title I, Section 12 of said Act, 15 *U. S. C.* 77*l* and Title I, Section 5 of said Act, 15 *U. S. C.* 77e?

4. Where Second Party in above stated situation secures out-of-state purchasers of fractional interests in said unregistered mineral lease on fraudulent and misleading representations concerning its actual and potential production, can First Party not a party to fraud, be held jointly liable with Second Party to purchasers under the provisions of Title I, Section 12(1) of the Securities Act, 15 U. S. C. 77*l*(2)?

STATUTES INVOLVED

The statutory provisions involved are in the *Securities Act of 1933*, 15 *U. S. C.* 77a, 58 Stat. 74, et seq, and par-

ticularly Sections 77a, 77e, and 77*l*. The pertinent portions of the said statutes are set forth in Appendix "B" infra.

STATEMENT OF THE CASE

Petitioners, Dr. Walston Lynn, et al, brought this proceeding in the Western District of Louisiana seeking to rescind assignments made by respondent Jones of fractional interests in a mineral lease known as the Stevenson Lease in DeSoto Parish, Louisiana, and to recover the price paid amounting to $33,500.00. Two of the petitioners, Plaintiffs-Appellants below, are doctors and two are business men, all residing in the State of South Carolina and all unfamiliar with and inexperienced in the oil and gas business. Respondent Caraway is a banker residing in Mansfield, Louisiana. He has a fairly good knowledge of the oil and gas business and has some experience in operating a mineral lease. The other respondents, Jones and Allison, defendants below, are competent and experienced oil and gas well operators who are in the business of buying, selling, developing and operating oil and gas leases and wells.

Petitioner, Dr. Lynn, met Allison in Mansfield, Louisiana, on July 10, 1962, with a view of acquiring some mineral interests and producing wells in Louisiana. Allison represented to Dr. Lynn that he owned the Stevenson lease (R. 307) consisting of 600 acres in DeSoto Parish, Louisiana, with four producing wells with a life expectancy of forty years, and that each well would produce 35 barrels of oil per day or $1,250.000 a month for a 1/8 interest (R. 311). Allison said he would only sell a 49% interest and retain 51% because Lynn and his associates wouldn't know how to operate it. (R. 310). Dr. Lynn returned to South Carolina and reported to the other three petitioners his visit to the lease and his conversa-

tions with Allison concerning its great present and future potential value. Dr. Lynn had his banker, Bob Sibley, in Rock Hill, South Carolina, call defendant Caraway, President of the Mansfield Bank & Trust Company, concerning Allison's reliability and financial standing in the community. Sibley reported the results of his conversation with defendant Caraway and on the basis of that report and the representations made by Allison they agreed to buy a 3/8 interest in the Stevenson lease from Allison (R. 334) for which they paid the total sum of $33,500.00.

As a matter of fact Allison had no interest in the Stevenson lease during his negotiations with the plaintiffs, although he had approached Jones a few months earlier in March or April, 1962, and ascertained that Jones who owned a 3/16 interest in the lease was willing to sell his interest for $21,000.00 (R. 666). Allison then expressed a desire to buy the entire lease and Jones agreed to endeavor to buy out the interests of his co-owners. (R. 671). Jones assumed that Allison would be buying the lease for or with other parties because he had heard that Allison was in financial straits (R. 271). He later was informed that Allison had some out-of-town partners in the deal (R. 274) and some time before the deal was closed Jones knew that the purchasers were from South Carolina (R. 287-8, 298-9). Plaintiffs mailed their checks to Allison who in turn had Caraway, the bank president, to transmit the funds to Jones until the latter received the sum of $21,000.00 (R. 279). Finally, on August 31, 1962, on instructions from Allison, Jones executed assignments and mailed certified copies thereof to the plaintiffs of the fractional interests they had severally paid for. (R. 51, 675). The assignments were made in favor of the following parties and in the following interests:

Dr. Walston Lynn 1/8, Maxcy C. Lynn 1/8, Dr. Houston B. Odom 1/16, J. T. Jordan 1/16, and J. W. Caraway 5/8. Caraway received and held his interest on behalf of Allison because the latter had many liens, mortgages and judgments recorded against him and was insolvent. This interest was subsequently assigned by Caraway to a corporation owned by Allison. Because of an error in the description of the August assignment by Jones to the plaintiffs, corrected assignments were prepared and mailed to the plaintiffs by Jones on October 31, 1962 (R. 330) and on April 8, 1963. None of these transactions were registered with the Securities and Exchange Commission (R. 551).

As a matter of fact the Stevenson lease was not producing sufficient oil to pay expenses when it was assigned by Jones to plaintiffs on August 31, 1962, and was worthless as an investment (R. 501). In October, 1962, some two months following the first assignment, plaintiffs discovered the fraud, demanded a rescission of the contracts and return of the purchase price and offered to reassign to defendants their fractional interests in the lease. (R. 442).

The District Judge concluded that Allison had by virtue of these facts acquired the lease from Jones, although no written sale or assignment was ever made to him, and that he was the owner who made the sale. (R. 715-716). Judgment was accordingly rendered against Allison, who is insolvent, but plaintiffs' demands against Jones and Caraway were dismissed (R. 721). Plaintiffs appealed and the Court of Appeals affirmed the judgment of the District Court. Allison did not appeal.

ARGUMENT

1. The decisions of the Court below rejecting plaintiffs' demands against Jones are in conflict with the provisions of the Securities Act of 1933 and with the applicable decisions of this Court.[1] It is apparent from the record that respondents Jones and Allison entered into an agreement whereby Jones who owned only a 3/16 interest in an oil and gas lease would acquire the remaining interests and assign certain fractional interests therein to plaintiffs who had dealt with Allison on his representation that he owned the lease in its entirety. Allison kept Jones posted at all times concerning the progress of his negotiations with the petitioners who reside in South Carolina (R. 557-8), and when the negotiations were completed Jones himself prepared the assignments and mailed them to the buyers. Allison had no written assignments, counter letters or sales memoranda giving him an interest in the lease. It is admitted that neither the lease nor the assignments were registered with the Securities and Exchange Commission.

Since Jones was the title holder and mailed the assignments to plaintiffs, he was the issuer as defined in the Securities Act of 1933, 15 U. S. C. 77b(4), thus:

> (4) The term "issuer" means every person who issues or proposes to issue any security; . . . with respect to fractional undivided interests in oil, gas, or other mineral rights, the term "issuer" means the owner of any such right or any interest in such right (whether whole or fractional) who creates fractional interests therein for the purpose of public offering.

There is nothing in the record to support a finding that

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1 *Securities and Exchange Commission vs. Joiner Leasing Corp.*, 320 U. S. 344, 88 l. ed. 88.
Securities and Exchange Commission vs. W. J. Howey Co., 328 U. S. 293, 90 L. ed. 1244.

Jones ever sold or assigned the mineral lease to Allison. There is some doubtful evidence that a verbal sale was made of a 3/16 interest between these parties, which is less than the interests that were sold to the plaintiffs.[2] However, a verbal sale of real estate or mineral interests is void in Louisiana. Article 2440 of the *Louisiana Civil Code* specifically provides that "every verbal sale of immovables shall be null, as well for third persons as for the contracting parties themselves, and the testimonial proof of it shall not be admitted." This Article of the Louisiana Civil Code has for its purpose the prevention of fraud in the sale of valuable property rights just as the Securities Act seeks to prevent fraud in the sale of securities.

In *Woodward vs. Wright*, 266 F. 2d 108, the court held that in order to be an "issuer," the sellers of fractional interests in oil and gas leases must have been the owners thereof. Whatever verbal arrangements were made between Jones and Allison, concerning the acquisition and sale of the mineral rights to the plaintiffs, were merely executory contracts for a later assignment, as stated by the court in *Moses vs. Michael*, 292 F. 2d 614, 617. In that case the court ruled that "the formal assignment executed by appellants to the several appellees was clearly a security within the meaning of the act."

It may be noted that the term "issuer" as defined in 15 *U. S. C.* 77b (4) is given two different meanings. In so far as ordinary contracts and securities are concerned, the term means "every person who issues or proposes to issue any security." But when it comes to defining the issuer of fractional interests in oil, gas or other mineral rights, the term

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[2] There is no evidence whatever that Jones sold to Allison the remaining 13/16 interest in this lease. Since Jones himself made the assignments to plaintiffs, it must be presumed that no such sale occurred.

"issuer" means "the *owner* of any such right or interest." If this doesn't mean the holder of the legal title to such oil interests then it was wholly unnecessary to make the distinction contained in the Act. Jones was the real owner of the mineral interests and was consequently the "issuer" of the security. As such he is liable to plaintiffs.

Jones has violated the Securities Act in still another capacity. By reason of his active participation with Allison in acquiring the fractional minerals which he thereafter assigned to plaintiffs, Jones became an underwriter in view of the definition in the *Securities Act*, 15 *U. S. C.* 77b (11):

> "The term underwriter means any person . . . who participates or has a direct or indirect participation in any such undertaking, or participates or has a participation in the direct or indirect underwriting of any such undertaking."

The foregoing section was thus interpreted in *Securities and Exchange Commission vs. Van Horn*, 371 F. 2d 181, 188:

> "The statutory definition specifically covers every person who participates in a distribution of securities."

In *Securities and Exchange Commission vs. Guild Films, Inc.*, 178 F. Supp. 418, affirmed 279 F. 2d 485, Cert. Den. 364 U. S. 819, it was decreed that one who consciously engages in the public distribution of a security is an underwriter who must comply with the Securities Act. In this case a bank distributed corporate stock on behalf of the owner.[3]

The use of the mails by Jones for the purpose of delivery after the assignment had been made is also forbidden by 15 *U. S. C.* 77e(a) which provides in part:

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3 Other decisions adopting this principle are:
Schillner vs. Vaughan Clarke & Co., 134 F. 2d 875, 877.
Wall vs. Wagner, 125 F. Supp., 854, af'd. 226 F. 2d. 868.
Zachman vs. Erwin, 186 F. Supp. 681.

"(a) Unless a registration statement is in effect, it shall be unlawful for any person, directly or indirectly . . .

(2) to carry or cause to be carried through the mails or in interstate commerce by any means or instruments of transportation, any such security for the purpose of sale, or for delivery after sale."

In *Blackwell vs. Bentzen*, 203 F. 2d 690, Cert. Den. 347 U. S. 925, the court ruled that "Delivery of the deeds and contracts is an integral part of the sale."

In *Securities and Exchange Commission vs. Franklin Atlas Corporation*, 171 F. Supp. 711, 716-17, the court ruled that "A delivery of shares is in, and of itself, a 'sale' of those shares within the definition of 'sale' in Section 2(3) of the Act."

To hold Jones equally liable with Allison for his participation in the plan to acquire and distribute fractional oil and gas interests it is not necessary to prove fraud or his participation in the fraud. As the Fifth Circuit said in *Price vs. United States*, 200 F. 2d 652, at page 654:

"Fraud is not a necessary constituent of the offense, for disclosure through registration to give investors the means of knowledge was the purpose of this remedial statute. Frost & Co. v. Coeur D'Alene Mines Corp., 312 U. S. 38, 43, 61 S. Ct. 414, 85 L. Ed. 500; Otis & Co. v. Securities and Exchange Commission, 6 Cir., 106 F. 2d 579, 583."

The penalty for violation of the provisions of 15 *U. S. C.* 77e is set forth in 15 *U. S. C.* 77*l* which permits the buyer to rescind the sale and demand a return of the purchase price.

Although violation of the Securities Act may be a technical one, liability under the Act is absolute. *Repass vs. Rees*, 174 F. Supp. 898, 906.

2. The questions presented here are of great importance in the administration of the Securities Act. The rulings of the district and appellate courts would withdraw from the investing public the protection which the Act seeks to achieve. This Court in the case of *Securities and Exchange Commission vs. Joiner Leasing Corp.*, 320 U. S. 344, 352, 88 L. ed. 88, 93, recognized the fact that oil and gas rights "were notorious subjects of speculation and fraud" and stated that the Act reaches "novel, uncommon, or irregular devices whatever they happen to be." And in *Securities and Exchange Commission vs. Howey Co.*, 328 U. S. 293, 301, 90 L. ed. 1244, 1251, this court stated that "The statutory policy of affording broad protection to investors is not to be thwarted by unrealistic and irregular formulae."

If the decrees of the lower court are to stand, then any unscrupulous oil promoter can escape the liability created by the Act by simply employing a judgment-proof individual to pose as the real owner of the securities sold through some verbal agreement to that effect. Congress must have had in mind the common law statute of frauds, which has been adopted throughout the land, when it referred to the "issuer" of a security as the "owner" thereof. Otherwise the door of fraud can be easily opened.

3. The plaintiffs allege that they were induced to purchase their mineral interests by misrepresentations and fraud, and the record substantiates these allegations in so far as defendant Allison is concerned. However, the lower courts did not pass on this issue. Although Jones may not have joined in the fraud he nevertheless must be bound by the misrepresentations of his associate in the transaction.

One who participates in the sale and distribution of a security is equally liable with a co-defendant who practices fraud in the sale of a security.

Maxfield vs. U. S., 360 F. 2d 97, Cert. Den. 385 U. S. 830
Zachman vs. Erwin, 186 F. Supp. 691.

In this case Jones received $21,000.00 as a result of the fraud and misrepresentations made by his co-defendant Allison. He cannot on well-known principles of equity retain the consideration and participate in the fruits of the fraud without making himself a party thereto. The lower courts should have held Jones liable for this reason also.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

ORIGINAL SIGNED
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CERTIFICATE OF SERVICE

I hereby certify that copies of the above and foregoing petition for writ of certiorari has been served upon counsel for the defendants by mailing copies thereof, postage prepaid and properly addressed, as follows:

Mr. Marion K. Smith
908 Petroleum Tower
Shreveport, Louisiana 71101

Cook, Clark, Egan, Yancey & King
600 Commercial National Bank Building
Shreveport, Louisiana 71101,

this 8th day of July, 1968.

ORIGINAL SIGNED
W. SCOTT WILKINSON

W. Scott Wilkinson
of counsel for Petitioners.

APPENDIX "A"

OPINIONS AND DECREES BELOW

Opinion of United States District Court for the Western District of Louisiana:

(Number and Title Omitted)

Ben C. Dawkins, Jr., Chief Judge

OPINION ON THE MERITS

This action is brought by four individual plaintiffs, all citizens of South Carolina, against three individual defendants, citizens of Louisiana, alleging, in addition to diversity of citizenship, jurisdiction under the Securities Act of 1933.[1] The dispute has arisen over the assignment to plaintiffs of fractional undivided interests in a certain oil and gas lease, located within this district. Plaintiffs seek rescission of the assignment contract and the return of the price paid, some $33,530.00, plus interest, costs, and attorney's fees.

The claim is stated in two alternative theories, the first invoking the civil liabilities provisions of the Securities Act of 1933, particularly sections 5, 12 and 17. The second relies upon the general law of fraud, contained in the provisions of Louisiana Civil Code of 1870, articles 1847 and 2547.

The facts are not too complicated. In early 1962 the defendant Carl W. Jones was the owner of a fractional undivided portion of the 7/8 "working interest" in a certain oil and gas lease, known as the "Stevenson" Lease, here in dispute.

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1 15 U. S. C. §§ 77a *et seq.* For convenience, reference will be to the original sections of the Act, in accordance with section 1 thereunder. 15 U. S. C. § 77a.

He was also designated operator of the lease, which contained over 500 acres on which four producing wells had been drilled. The defendant M. L. Allison was a local oil man, engaged in lease brokering as well as owning and operating oil leases and drilling wells. In the past Allison had bought and sold leases and portions of leases for Jones, as a lease broker.

In July, 1962, Allison was approached by Dr. Walston A. Lynn, one of the plaintiffs herein, who indicated an interest in making oil investments. Allison showed the "Stevenson" lease to Dr. Lynn and discussed a proposition whereby each of the plaintiffs would purchase fractional undivided interests in the lease. During his first sojourn in Louisiana to view the "Stevenson" lease, Dr. Lynn was introduced by Allison to defendant J. W. Caraway, who was president of a local bank in Mansfield, Louisiana.

After his return to South Carolina, Dr. Lynn, who by this time had interested his co-plaintiffs in the particular investment venture with Allison, instructed his banker, Robert E. Sibley, to telephone Caraway, with the view of checking up on Allison through banking channels, and to determine whether Allison was trustworthy and reliable and whether he owned the "Stevenson" lease. Probably as the result of a favorable impression created by Sibley's telephone call to Caraway on July 14, 1962, the plaintiffs became more enthusiastic about the investment. But it was only after a second visit to the lease site on July 23, 1962, by Dr. Lynn, and an actual inspection thereof by two of the other plaintiffs, that Allison received the sum of $33,530.00 from the four plaintiffs.

After Allison received a portion of the funds advanced by plaintiffs, he consummated his agreement with Jones, who

had agreed to buy out his co-owners and sell the whole lease—that is, the 7/8 "working interest"—to Allison or his designees. Then, on July 31, 1962, a document evidencing an assignment from Jones of 3/8 of the 7/8 "working interest" to the plaintiffs and 5/8 of the 7/8 to defendant Caraway, as Allison's designee, was prepared and *mailed* to the plaintiffs.[2]

At the time of the assignment, and all pertinent times, neither Jones nor Allison had registered the sales of these fractional undivided interests in oil rights as "securities" under the Securities Act of 1933.

When Dr. Lynn received the document evidencing the corrected assignment, noting that it came from Jones and not Allison, he stated he began to "smell a rat." He returned to Louisiana September 18, 1962, and discovered that Allison was in extreme financial difficulties, and was probably insolvent. He then employed counsel to advise him as to the proper course of conduct he should take with respect to Allison and his newly acquired lease interests.

Subsequently this action was brought in behalf of all four South Carolina investors seeking rescission of the assignment and return of the price paid. It will be necessary to discuss each of plaintiffs' theories of the case generally and particularly with respect to each of the three defendants.

The financing of the development of oil and gas properties has been as correspondingly peculiar as the technical character of the industry to traditional legal and economic notions. The typical exploitation of oil and gas reservoirs has

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[2] Because of an error on the part of Jones, the assignor, the correct proportions of the undivided lease interest were not shown in this assignment, but a corrected document was subsequently mailed evidencing assignment in the intended proportions of the working interest: Walston A. Lynn—1/8; Maxie C. Lynn—1/8; J. T. Jordan—1/16; and Houston B. Odom—1/16.

been by the large oil company which leases large amounts of acreage for their operation even prior to the making of geologic and geophysical estimates. The large company's activities are better suited to the task as the company will usually be a well organized and well financed corporation. But in the less typical, but nonetheless usual, situation an individual or small company will hold oil leases, with the expectation of self-development. Therefore, to assist the small operator in his enterprise, the practice of dividing the ownership rights in the leasehold itself has come into wide usage, in order to raise the necessary funds.

The lessor-landowner receives, in addition to a cash bonus, and in some cases a fixed periodic rental payment for the right not to drill immediately, a further promise by the lessee to pay a percentage, usually one-eighth, of the oil and gas actually produced. The lessee's seven-eighths is termed the "working interest." While the large company, with adequate financing, may retain the whole of the "working interest," the small operator may be able to raise needed funds only through the sale of fractional undivided interests in his lease rights, with the commensurate promise to the purchaser to share in the production. Without this facility to raise money the small oil operator would likely be relegated to incorporation, and the sale of shares in his company, an often cumbersome and unsatisfactory manner of raising funds. At the same time, it must be remembered that an investment in an oil venture is often speculative in direct proportion to the chance that oil underlies the particular plot of ground.

The possibility of abuses in such a system of financing is obvious. With the evil in mind, the remedy embodied in the Securities Act of 1933 was designed "to provide full and fair

disclosure of the character of the securities sold in interstate commerce and through the mails and to prevent fraud in the sale thereof." In keeping with this broad purpose the Act defined, in section 2(1), the term "security" as meaning, among other things, "any . . . fractional undivided interest in oil, gas or other mineral rights . . . ." The principle underpinning the statutory provision appears to be that no matter what the form or the terminology used, if the interest conveyed does not contemplate operation of the lease or drilling of wells by the purchaser, and does hold out to the purchaser an expectation of profit from the operation of others, the interest is probably a "security" under the Act.[3] Perhaps as a limiting feature, the 1934 amendments supplied a special definition of the term "issuer" with respect to these fractional undivided interests, providing that "issuer" means "the owner of any such right or of any interest in such right (whether whole or fractional) who creates fractional interests therein for the purpose of public offering." Section 2(4).

It therefore follows that not every transaction involving the sale of a fractional undivided interest in oil, gas or other mineral rights is necessarily the sale of a "security" under the Act. It is only that interest which is created by subdivision of a portion of the owner's interest for the purpose of a public offering for sale which is reached by the Act. Thus if the seller transfers the whole of what he owns, there can be no creation of the interests by him, as "issuer," such as would be

[3] See *S. E. C.* v. *W. J. Howey Co.*, 328 U. S. 293 (1946); *S. E. C.* v. *C. M. Joiner Leasing Corp.*, 320 U. S. 344 (1943). In the *Howey Co.* case the Supreme Court said: "The test is whether the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others. If that test be satisfied, it is immaterial whether the enterprise is speculative or non-speculative or whether there is a sale of property with or without intrinsic value . . . The statutory policy of affording broad protection to investors is not to be thwarted by unrealistic or irrelevant formulae." 328 U. S. at 301.

counted "securities" within the meaning of the Act. *Graham* v. *Clark*, 332 F. 2d 155 (6 Cir. 1964); *Roe* v. *United States*, 287 F. 2d 435 (5 Cir. 1961), *cert. denied* 368 U. S. 824. See also *Woodward* v. *Wright*, 266 F. 2d 108 (10 Cir. 1959).

The legislative purpose behind such a distinction was well stated in *S. E. C.* v. *C. M. Joiner Leasing Corp.*, 320 U. S. 344, 352 (1943).

> "Oil and gas rights posed a difficult problem to the legislative draftsmen. Such rights were notorious subjects of speculation and fraud, but leases and assignments were also indispensable instruments of legitimate oil exploration and production. To include leases and assignments by name might easily burden the oil industry by controls that were designed only for the traffic in securities. This was avoided by including specifically *only that form of splitting up of mineral interests which had been most utilized for speculative purposes.*" (Emphasis added.)

The Securities Act of 1933 affords protection to the investing public by requiring the filing with the S. E. C. of a registration statement containing material facts bearing upon the investment merit of securities which are publicly offered or sold through the use of the mails or through the instrumentalities of interstate commerce. Thus section 5 provides in part:

> "(a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly —
>
> "(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise; or
>
> "(2) to carry or cause to be carried through the mails or in interstate commerce, by means or

instruments of transportation, any such security for the purpose of sale or for delivery after sale."

Violation of section 5(a) subjects the vendor to liability under section 12(1) of the Act to his vendee for return of the consideration paid for the securities purchased, with interest, less the amount of any income received thereon, upon the tender of the securities; if he no longer owns the security, then recovery is limited to the purchaser's damages.[4] To assert this virtually absolute liability the plaintiff need only allege and prove (1) that the defendant was a seller, or, under section 15, a person in control of a seller;[5] (2) that the mails or some means of transportation or communication in interstate com-

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4 Section 12 provides:

"Any person who —

"(1) offers or sells a security in violation of section 5, or

"(2) offers or sells a security [whether or not exempted by the provisions of section 3, other than paragraph (2) of subsection (a) thereof], by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission,

shall be liable to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security."

5 Section 15 provides: "Every person who, by or through stock ownership, agency, or otherwise, or who, pursuant to or in connection with an agreement or understanding with one or more other persons by or through stock ownership, agency or otherwise, controls any person liable under section 11 or 12, shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable, unless the controlling person had no knowledge of or reasonable grounds to believe in the existence of the facts by reason of which the liability of the controlled person is alleged to exist."

The typical case under section 15 is rescission as against the purchaser's *immediate seller*, who may be a dealer, or an *underwriter*. But the relief contemplates ultimate recovery over against the issuer, by the innocent middleman. In order for the investor to recover directly against the issuer, the latter must be "in control of" the investor's immediate seller. See generally 3 *Loss, Securities Regulation* 1808 (2d ed. 1961).

merce was used;[6] and (3) that the defendant failed to comply with the requirements of section 5 of the Act.[7] The only defense to an action under section 12(1), outside of the one-year limitation period provided by Section 13, is allegation and proof by the defendant that the particular security or transaction was exempt from the provisions of section 5.[8] Moreover, the burden of proving an exemption rests clearly upon the defendant. See, *e.g.*, *S. E. C.* v. *Ralston Purina Co.*, 346 U. S. 199, 126 (1953).

In addition to the liability for violation of section 5 provided by section 12(1), civil relief is available under section 12(2)[9] and section 17[10] in favor of the purchaser upon

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6 While it is true in principle that the use of the mails or interstate commerce must be with respect to the particular plaintiffs, and not just in connection with the offering of the security generally, it has been held that either the mailing of the original of a lease assignment to the official recorder of such documents, or the mailing to the purchaser of a photostatic copy of the assignment, satisfies the requirements of the Act. See *Moses* v. *Michael*, 292 F. 2d 614, 619 (5 Cir. 1961).

7 An additional prerequisite to recovery has been that adequate tender of the security to the defendant be made. In the oil and gas lease cases, however, the requirement has been relaxed to a significant extent. Adequate tender was made in *Moses* v. *Michael*, 292 F. 2d 614 (5 Cir. 1961), by each plaintiff in his bill of complaint. And, in *Repass* v. *Rees*, 174 F. Supp. 898 (D. Colo. 1959), a judgment casting a violator of § 5 was conditioned upon tender into Court of assignments executed by plaintiffs conveying all their rights and title to the oil and gas leases, with full warranty.

8 Certain transactions may be exempt from the registration provisions of section 5 under section 4. See, *e.g.*, *Garfield* v. *Strain*, 320 F. 2d 116 (10 Cir. 1063).

Oil and gas "securities" may be exempt from section 5 under the ordinary exemptions of section 3. However, the peculiarities of financing oil and gas interests are such that a special conditional exemption has been provided for various species of fractional undivided interests in oil and gas rights by Regulation B of the General Rules and Regulations under the Securities Act of 1933. 17 CFR 230.300 *et seq.* See 1 *Loss, Securities Regulation* 635 (2d ed. 1961).

9 See note 4, *supra.*

10 Section 17 provides:

"(a) It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or com-

Footnote Continued on Next Page

whom fraud or other misrepresentations have been practiced. See generally, Annot. 50 A. L. R. 2d 1228 (1956).

Turning to the case here presented, it is clearly established that defendant Jones sold the whole of his interest in the "Stevenson" lease. Because he has not created or issued a "security" within the meaning of the Act, Jones cannot be said to have violated section 5; therefore the section 12(1) remedy is not available against him. Similarly, Jones cannot be liable under either section 12(2) or section 17 which proscribe the misrepresentation of a material fact in the offer or sale of a "security." But notwithstanding our holding of the non-applicability of these sections to Jones, as assignor, it is clear from the record that Jones neither made nor participated in the making of any untrue statement or omission in the transactions.

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munication in interstate commerce or by the use of the mails, directly or indirectly—

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

"(b) It shall be unlawful for any person by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, to publish, give publicity to, or circulate any notice, circular, advertisement, newspaper, article, letter, investment service, or communication which, though not purporting to offer a security for sale, describes such security for a consideration received or to be received, directly or indirectly, from an issuer, underwriter, or dealer, without fully disclosing the receipt, whether past or prospective, of such consideration and the amount thereof.

"(c) The exemptions provided in section 3 shall not apply to the provisions of this section."

Both sections 12(2) and 17 are complete departures from the common law of fraud and deceit. Whereas section 12(2) provides its own civil remedy, section 17 does not. It has been held that civil liability under section 17 is implied from the language making the proscribed conduct unlawful. See *Surowitz* v. *Hilton Hotels Corp.*, 342 F. 2d 596 (7 Cir. 1965), and cases cited therein at page 604. Moreover, in view of the preservation of section 16 of "any and all other rights and remedies that may exist at law or in equity," it is entirely possible that courts would hold sales or contracts in violation of section 17 to be avoidable in any event.

On the other hand, the evidence is clear that Allison created a fractional undivided interest in the "Stevenson" lease by purchasing the whole working interest from Jones and selling 3/8 to these plaintiffs. Rather than executing a document evidencing the assignment from Jones to Allison, and another from Allison to plaintiffs, Allison had Jones prepare a document showing an assignment from the latter directly to plaintiffs, and to defendant Caraway, as Allison's designees, which was then mailed to plaintiffs. It is also proven that Caraway was named assignee of a 5/8 interest solely for the convenience of Allison, who held an unrecorded counter-letter. It seems that when Allison fell into financial difficulties he did not take title in his name nor record his counter-letter for fear of attaching creditors. Nonetheless, it was adequately shown that Caraway had no actual interest in the lease, and that he subsequently assigned his record title to Allison's designees for no monetary consideration.[11]

Under this explanation of the significant facts, it is easily seen that Allison created "securities" under section 2(1) of the Act, and his failure to register the sale of the fractional undivided interests going to the plaintiffs constitutes a violation of section 5, which subjects Allison to civil liability under section 12(1) of the act.[12] In reaching this conclusion we have

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11 Plaintiffs have formulated an argument based upon the public records doctrine and the parol evidence rule in an attempt to bind the parties to a situation which would appear to be the case to a third party examining the face of the public records. Just as it is true that these doctrines protect the third party purchaser, neither doctrine is available to prevent these, the parties to the actual transactions, from showing the true character of the transactions, as well as the true consideration paid, by the use of parol evidence and the unrecorded counter-letter.

12 We have been guided to this conclusion by the following cases, each of which was decided on facts quite similar to those found in the case here

Footnote Continued on Next Page

given the benefit of every doubt to Allison, even though he failed to appear at the trial of the case. He was, however, represented by counsel.

Plaintiffs seek to subject Jones to liability on the theory of *respondeat superior*—that he was Allison's principal in the sale of these "securities." They cite *Wall* v. *Wagner*, 125 F. Supp. 854 (D. Neb. 1954), *aff'd sub nom. Whittaker* v. *Wall*, 226 F. 2d 868 (8 Cir. 1955), where an individual as "representative" of a corporation sold to the plaintiff a 1/16 working interest in a lease owned by the corporation, in violation of section 5 of the Act. Both agent and principal were held liable for the return of the price, where "(t)he trial court, on substantial evidence, found specifically that Wagner was an agent of Pay Rock Oil Inc." 226 F. 2d at 871. See also *Lennerth* v. *Mendenhall*, 234 F. Supp. 59 (N. D. Ohio 1964).

Contrary to plaintiffs' assertions here, we find Jones not to have been the principal of Allison. Although the records of the Louisiana Department of Conservation do not indicate a change in operators for some time after the sales in question, we find the more pertinent evidence clearly points to a final sale from Jones to Allison, rather than a continuing principal-agent relationship. Similarly, we do not find Jones to have

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presented: *Can-Am Petroleum Co.* v. *Beck*, 331 F. 2d 371 (10 Cir. 1964); *Moses* v. *Michael*, 292 F. 2d 614 (5 Cir. 1961); *Woodward* v. *Wright*, 226 F. 2d 108 (10 Cir. 1959); *Whittaker* v. *Wall*, 226 F. 2d 868 (8 Cir. 1955); *Repasi* v. *Rees*, 174 F. Supp. 898 (D. Colo. 1959); and *Dupler* v. *Simmons*, 163 F. Supp. 535 (D. Wyo. 1958).

For a general discussion of the applicability of both State and Federal Securities Acts to the sale of fractional undivided interest in oil and gas leases and mineral rights, see Sterling, *Impact of State and Federal Securities Acts on Everyday Oil and Gas Transactions*, in Southwestern Legal Foundation, *Eighth Annual Institute on Oil and Gas Law and Taxation* 33 (1957). See also 1 *Loss, Securities Regulation*, 469 (2d ed. 1961); 3 *Loss, Securities Regulation*, 1962 (2d ed. 1961); 2 Williams and Meyers, *Oil and Gas Law*, §§ 441 et seq.

been "in control of" Allison within the meaning of section 15 of the Act[13] so as to subject him to joint and several liability with Allison.

The basis of plaintiffs' claim against Caraway seems to stem from his telephone conversation with plaintiffs' banker, Sibley, in South Carolina. It is contended that Caraway knew the circumstances surrounding Allison's insolvency and his failure to relate such information to Sibley was an omission "to state a material fact necessary" to the offer or sale of securities under sections 12(2) and 17 of the Act. Plaintiffs further assert that Caraway was asked point blank: "Does Allison own the Stevenson lease?"; Caraway is said to have replied: "You can rely on anything Allison says." On the other hand, Caraway testified that when asked that question, he replied that he knew none of the details concerning the Stevenson Lease. In view of the totality of the circumstances and the fact that Allison subsequently purchased the lease, we think it the more plausible explanation that Caraway knew Allison was dealing with the lease, but did not know exactly who owned it at the time.

We find plaintiffs' position untenable for two reasons. First, we do not believe the asserted activity of Caraway is reached by either section 12(2), which provides for the liability of "any person who— * * * (2) *offers or sells a security* . . ." or section 17, which provides, *"it shall be unlawful for any person in the offer or sale of any security* . . . ." Any statements or omissions made by Caraway came at a time when by no stretch of the imagination could he have had any interest in the "offer or sale of" these securities.

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13 See note 5, *supra*.

Second, and perhaps more importantly, we find the more pertinent evidence to indicate that Caraway in fact made no proscribed statement or omission under the Act.[14] In reaching this conclusion, we note that Caraway, in addition to speaking with Sibley, also spoke to one Jenkins, another bank official in South Carolina. Even though plaintiffs alleged misrepresentations by Caraway to this gentleman, they failed to produce his testimony at the trial. Thus we must infer that his testimony would corroborate Caraway rather than Sibley.

Although the same theories of recovery were stated against all defendants, it was not seriously contended or shown to the Court, that Jones was guilty of any misrepresentations. It is our further conclusion that inasmuch as neither Jones nor Caraway made any misrepresentation under the Securities Act, *a fortiori*, neither committed any fraud under the general law of fraud in Louisiana. See LSA Civil Code arts. 1847, 2547 (1870).

With respect to Allison, however, we find it unnecessary to decide whether he committed any fraud upon the plaintiffs, in view of the adequate relief afforded them under section 12(1) of the Act.

After a further and extensive review of all points raised by all parties hereto, we are unable to find any matter or argument which adds to or detracts from our above conclusions. Therefore for the reasons assigned we find in favor of plaintiffs against defendant M. L. Allison, together with legal interest

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14 In *Ouachita Indus., Inc.* v. *Willingham*, 179 F. Supp. 493 (W. D. Ark. 1959), it was held that where under the totality of the circumstances, especially with respect to the high risks of failure involved, the evidence was insufficient to establish misrepresentations in the sale of fractional undivided interests in oil and gas leases.

from judicial demand and costs, less any income received upon these securities. Allison having raised no defense to this suit, for the obvious reason that no meritorious defense exists to plaintiffs' claim for recission, we award attorney's fees under the provisions of section 11(e) of the Act in the amount of $3,350.00. See *Can-Am Petroleum Co.* v. *Beck*, 331 F. 2d 371 (10 Cir. 1964); *Stadia Oil and Uranium Co.* v. *Wheelis*, 251 F. 2d 269 (10 Cir. 1957). We further find in favor of defendants Carl W. Jones and J. W. Caraway, rejecting plaintiffs' demands.

An appropriate decree should be presented.

THUS DONE AND SIGNED in Chambers at Shreveport, Louisiana, this 8th day of April, 1966.

/s/ Ben C. Dawkins, Jr.
CHIEF JUDGE

Filed:
April 8, 1966

Opinion of the United States Court of Appeals for the Fifth Circuit, entered July 5, 1967, and reported in 379 F. 2d 943:

(Number and Title Omitted)

Before BELL and GODBOLD, Circuit Judges, and NOEL, District Judge.

PER CURIAM: This is an appeal from a judgment entered in favor of the appellees Caraway and Jones in an action filed in federal district court to rescind a contract for the sale of certain fractional undivided interests in an oil and gas lease, referred to herein as the Stevenson lease. The district court found for the appellants against a third defendant, M. L. Allison, who is not a party to the appeal.

Appellants contend that said interests were unregistered securities transferred in violation of the registration requirements of the Securities Act of 1933, 15 U.S.C. §§ 77 *l*(1) and 77 *o*, and that there was fraud and misrepresentation in the sale of the securities in violation of the Act, 15 U.S.C. §§ 77 *l* (2) and 77 *q*. They also contend that the transaction violated the general law of fraud in Louisiana, Louisiana Civil Code of 1870, articles 1847 and 2547.

The facts have been fully stated by the district court in a light most favorable to the appellants. *Lynn* v. *Caraway*, 252 F. Supp. 858 (W.D. La. 1966). After a thorough examination of the record, we are of the opinion that the district court's findings of fact are not clearly erroneous, and that the conclusions of law are supported by the cases considered persuasive by this court. The judgment of the district court is, therefore, affirmed. One matter, however, merits clarification.

In its opinion, the district court found that Jones had sold all of his interest in the Stevenson lease to Allison, and held that he had not issued a security because he had not created a fractional undivided interest in the Stevenson lease.[1] A seller may, as the appellants contend, transfer his whole interest in oil, gas, or other mineral rights and still have transferred an investment contract, also a security under the Act.[2]

An investment contract is defined as "a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party . . . ." *SEC* v. *Howey*, 328 U. S. 293, 298-99 (1946). See also *Roe* v. *United States*, 287 F. 2d 435 (5th Cir.), *cert. denied*, 368 U. S. 824 (1961), second appeal, 316 F. 2d 617, 620 (5th Cir. 1963). If the purchaser of a seller's whole interest in mineral rights is led to expect a profit from the development of the minerals solely from the efforts of the promoter or a third party, more than a "naked leasehold right" has been transferred, and an investment contract — a security — may have been assigned. *SEC* v. *C. M. Joiner Leasing Corp.*, 320 U. S. 344, 348 (1943); *Roe* v. *United States*, *supra*.

In this case, however, it is apparent that Jones did not assign an investment contract. The district court found that

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1 The district court denominated the interest sold by Jones to Allison as a working interest. "Working interest" and "interest in an oil and gas lease" (Stevenson lease) are substantially synonymous, and, for purposes of this case, it is appropriate to use the terms interchangeably.

2 The Securities Act of 1933 defines "security" to include an "investment contract . . . [and a] fractional undivided interest in oil, gas, or other mineral rights . . . ." 15 U. S. C. §77b (1). See Roe v. United States, 316 F. 2d 617, 620 (5th Cir. 1963).

Jones sold his whole interest in the lease to Allison.[3] There is no evidence in the record to support a finding that Jones made any promise or agreement in addition to selling a naked leasehold right; while, on the other hand, the record does disclose that Jones agreed to relinquish control of the lease to Allison. The judgment of the district court will not be disturbed.

AFFIRMED.

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3 Appellants argue that it was Jones and not Allison who was the owner of the Stevenson lease and who issued the fractional undivided interests therein.

Appellants contend that Jones owned the lease when the fractional interests were assigned because the transfer from Jones to Allison was neither in writing nor recorded, as required by Louisiana Revised Statutes 9:2721 and Louisiana Civil Code articles 2266, 2276 and 2440, and therefore was void.

The district court allowed the introduction of parol evidence and an unrecorded counter-letter which established a verbal sale of the lease to Allison, reasoning that the purpose of the evidence was to show the true character of the transaction and the consideration paid for the lease. 252 F. Supp. at 864, n. 11. The Louisiana law is settled that "The rule which forbids the proving of title to real estate by parol evidence is not applicable to evidence which is offered for some other purposes, for which it is relevant and competent, and which relates only collaterally and unavoidably to, and without establishing or affecting the ownership of real estate." Emerson v. Shirley, 188 La. 196, 175 So. 909, 912 (1937).

This is a suit brought by the appellants to rescind the sale of unregistered securities under the provisions of the Securities Act of 1933. Proving a transfer of ownership in the lease from Jones to Allison for the purpose of determining which party issued unregistered securities is clearly an issue which is collateral to proving title to the lease.

The appellants also allege that Jones retained the title to the Stevenson lease in his name, assigned the fractional undivided interests therefrom and was the issuer of the securities. The district court found that Jones had completed the sale to Allison prior to the transfer to appellants, and that Jones made the fractional assignments merely as an accommodation to Allison. The finding is not clearly erroneous, and the result is correct. Compare Woodward v. Wright, 266 F. 2d 108, 115 (10th Cir. 1959); First Trust & Savings Bank of Zanesville, Ohio v. Fidelity-Philadelphia Trust Co., 214 F. 2d 230 (3d Cir.), *cert. denied*, 348 U. S. 856 (1954); Winter v. D. J. & M. Inv. and Constr. Co., 185 F. Supp. 943 (S. D. Cal. 1960). This does not mean that a seller of mineral rights can avoid the requirements of the Securities Act by making a sham sale to a third party or that he can engage in a practice of selling mineral rights to others with a view to the resale of fractional undivided interest by them. If he does, he may become an issuer or underwriter, thereby subjecting himself to the requirements of the Securities Act of 1933. See Woodward v. Wright, supra at 115; Pawcett, *Applicability of Federal and State Securities Acts to Sales of Oil and Gas Interests*, 17th Ann. Inst. of Oil & Gas Law and Taxation 269 (S. W. Legal Found. 1966); 1 CCH Fed. Sec. L. Rep. para. 1032.

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IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

(Number and Title Omitted)

ON PETITION FOR REHEARING (April 11, 1968)

Before BELL and GODBOLD, Circuit Judges, and NOEL, District Judge.

BY THE COURT:

The motion of appellants for a rehearing is DENIED.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

(Number and Title Omitted)

Before BELL and GODBOLD, Circuit Judges, and NOEL, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellants, Walston A. Lynn, and others, be condemned, in solido, to pay

the costs of this cause in this Court for which execution may be issued out of the said District Court.

July 5, 1967.

Issued as Mandate: April 22, 1968

APPENDIX "B"

STATUTES INVOLVED

The statutory provisions involved are in the *Securities Act of 1933*, 15 *U. S. C.* 77a, 48 Stat. 74, et seq. and particularly the following sections and paragraphs of said Act:

§77b. Definitions

When used in this subchapter, unless the context otherwise requires —

(1) The term "security" means any—fractional undivided interest in oil, gas, or other mineral rights" . . .

(3) The term "sale" or "sell" shall include every contract of sale or disposition of a security or interest in a security, for value. The term "offer to sell," "offer for sale," or "offer" shall include every attempt or offer to dispose of, or solicitation of an offer to buy, a security, or interest in a security, for value."

(4) The term "issuer" means every person who issues or proposes to issue any security; . . ; with respect to fractional undivided interests in oil, gas, or other mineral rights, the term "issuer" means the owner of any such right or any interest in such right (whether whole or fractional) who creates fractional interests therein for the purpose of public offering,

(11) The term "underwriter" means any person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security, or participates or has a direct or indirect participation in any such undertaking, or participates or has a participation in the direct or indirect underwriting of any such undertaking. As used in this paragraph the term "issuer" shall include, in addition to an issuer, any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer.

§77e. Prohibitions relating to interstate commerce and the mails

(a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly —

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise; or

(2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.

* * * * *

(2) to carry or cause to be carried through the mails or in interstate commerce any such security for the purpose of sale or for delivery after sale, unless accompanied or preceded by a prospectus that meets the requirements of subsection (a) of section 77j of this title.

(c) It shall be unlawful for any person, directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell or offer to buy through the use or medium of any prospectus or otherwise any security, unless a registration statement has been filed as to such security, or while the registration statement is the subject of a refusal order or stop order or (prior to the effective date of the registration statement) any public proceeding or examination under section 77h of this title. May 27, 1933, c. 38, Title I, § 5, 48 Stat. 77; June 6, 1934, c. 404, § 204, 48 Stat. 906; Aug. 10, 1954, c. 667, Title I, § 7, 68 Stat. 684."

§77L. Civil liabilities arising in connection with prospectuses and communications

Any person who —

(1) offers or sells a security in violation of section 77e of this title, or

(2) offers or sells a security [whether or not exempted by the provisions of section 77c of this title, other than paragraph (2) of subsection (a) of said section], by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission,

shall be liable to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security. May 27, 1933, c. 38, Title I, § 12, 48 Stat. 84; Aug. 10, 1954, c. 667, Title I, § 9, 68 Stat. 686.

Louisiana Civil Code:

ARTICLE 2440. All sales of immovable property shall be made by authentic act or under private signature.

Except as provided in article 2275, every verbal sale of immovables shall be null, as well for third persons as for the contracting parties themselves, and the testimonial proof of it shall not be admitted.

ARTICLE 2275. Every transfer of immovable property must be in writing; but if a verbal sale, or other disposition of such property, be made, it shall be good against the vendor, as well as against the vendee,

who confesses it when interrogated on oath, provided actual delivery has been made of the immovable property thus sold.

ARTICLE 2276. Neither shall parol evidence be admitted against or beyond what is contained in the acts, nor on what may have been said before, or at the time of making them or since.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

WALSTON A. LYNN, ET AL,
Petitioners,

versus

J. W. CARAWAY, ET AL,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT CARL W. JONES IN OPPOSITION

MARION K. SMITH
908 Petroleum Tower
Shreveport, Louisiana

Attorney for Respondent,
CARL W. JONES

Mid-South Press, Inc., Shreveport, Louisiana

NO. 278

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

WALSTON A. LYNN, ET AL,
Petitioners,

versus

J. W. CARAWAY, ET AL,
Respondents.

BRIEF OF RESPONDENT CARL W. JONES IN OPPOSITION

Respondent Carl W. Jones prays that a Writ of Certiorari not be granted for the reasons hereinafter expressed.

The four questions presented in the petition for certiorari do not pose important questions of federal law which have not already been settled by this Court. They are questions depending largely on facts already settled by two courts.

The lower Courts held the defendant Allison solely liable as the owner and issuer of unregistered securities under the Act, and rendered judgment against him.

As to Jones the Courts said: (Page references to the Petition for Certiorari)

> "Because he has not created or issued a "security" within the meaning of the Act, Jones cannot be said to have violated section 5; therefore the section 12 (1) remedy is not available against him." (*District Court Page* 22).
>
> "Contrary to plaintiffs' assertions here, we find Jones not to have been the principal of Allison." (*District Court Page 24*).
>
> "Similarly, we do not find Jones to have been "in control of" Allison within the meaning of section 15 of the Act so as to subject him to joint and several liability with Allison." (*District Court Page 25*).
>
> "Although the same theories of recovery were stated against all defendants, it was not seriously contended or shown to the Court, that Jones was guilty of any misrepresentations." (*District Court Page 26*).
>
> "The facts have been fully stated by the district court in a light most favorable to the appellants. *Lynn v. Caraway*, 252 F. Supp. 858 (W.D. La. 1966). After a thorough examination of the record, we are of the opinion that the district court's findings of fact are not clearly erroneous, and that the conclusions of law are supported by the cases considered persuasive by this court. The judgment

of the district court is, therefore, affirmed." (*Circuit Court Page 28*).

In the light of these pronouncements of non-liability of Jones, by two Courts, the petitioner would have this Court delve again into the facts to hold Jones liable.

The petitioner animadverts (*Page 11*) that:

> "If the decrees of the lower court are to stand, then any unscrupulous oil promoter can escape the liability created by the Act by simply employing a judgment-proof individual to pose as the real owner of the securities sold through some verbal agreement to that effect."

This is a purely hypothetical statement, not supported by the facts in this case, as found by the Courts below, which specifically held that Jones was not the depicted character of petitioner's hypothesis.

CONCLUSION

The petition for a Writ of Certiorari should be denied.

Respectfully submitted

MARION K. SMITH
908 Petroleum Tower
Shreveport, Louisiana

Counsel for Respondent
Carl W. Jones

CERTIFICATE OF SERVICE

I hereby certify that copies of the above and foregoing response to the petition for writ of certiorari has been served upon counsel for the petitioner by mailing copies thereof, postage prepaid and properly addressed, as follows:

W. SCOTT WILKINSON
P. O. Box 1707
Shreveport, Louisiana 71102

and also upon

Cook, Clark, Egan, Yancey & King
600 Commercial National Bank Building
Shreveport, Louisiana 71101

this _____ day of October, 1968.

MARION K. SMITH
Counsel for Respondent
Carl W. Jones

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No. 278

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

WALSTON A. LYNN, ET AL.,

Petitioners,

versus

J. W. CARAWAY, ET AL.,

Respondents.

OPPOSITION OF RESPONDENT, J. W. CARAWAY, TO PETITION FOR WRIT OF CERTIORARI.

BENJAMIN C. KING
600 Commercial National Bank Bldg.
Post Office Box 77
Shreveport, Louisiana 71102
Attorney for Respondent.

LECOMTE, SHREVEPORT, LOUISIANA

No. 278

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

WALSTON A. LYNN, ET AL.,

Petitioners,

versus

J. W. CARAWAY, ET AL.,

Respondents.

OPPOSITION OF RESPONDENT, J. W. CARAWAY, TO PETITION FOR WRIT OF CERTIORARI.

Respondent, J. W. Caraway, pursuant to the direction and request of the Court, submits herewith the following response to the petition for a writ of certiorari filed on behalf of Walston A. Lynn, et al, in this cause.

Being a party to the proceedings in the Court below, appearer, J. W. Caraway, is a respondent herein

pursuant to Rule 21, Paragraph 6, of this Honorable Court. Judgment was rendered in favor of your respondent by the District Court below upon findings of fact that your respondent was not engaged in the offer or sale of any security and, further, that your respondent made no proscribed statement or omission under the securities Act of 1933. 252 F. Supp. 858, 865; petition for certiorari herein, pages 25 and 26. These findings were affirmed by the Court of Appeals, Fifth Circuit, 379 F. (2d) 943; petition for writs herein, page 28.

In the petition for a writ of certiorari herein no issue or question is raised as to the judgment in favor of your respondent below. The questions presented, numbered 1 through 4 on pages 2 and 3 of the petition, refer solely to the relationship between respondent Jones (first party) and respondent Allison (second party), and the application of law to that relationship. No reference is made to respondent Caraway or any party in his position.

In the argument in support of the petition contained in pages 7 through 12, inclusive of said document, no mention is made of your respondent Caraway. In said argument, petitioners complain solely of the decisions of the courts below insofar as they concern petitioners' demands against respondent Jones.

As the petitioners herein do not complain of the judgment below in favor of respondent Caraway, this re-

spondent respectfully submits that said petition should be denied as to J. W. Caraway.

Respectfully submitted,

BENJAMIN C. KING

COOK, CLARK, EGAN, YANCEY & KING

600 Commercial National Bank Building
Shreveport, Louisiana 71102

CERTIFICATE OF SERVICE

I hereby certify that copies of the above and foregoing response to the petition for writ of certiorari has been served upon counsel for the other parties hereto by mailing copies thereof, postage prepaid and properly addressed, as follows:

Mr. W. Scott Wilkinson
Post Office Box 1707
Shreveport, Louisiana 71102

Mr. Marion K. Smith
908 Petroleum Tower
Shreveport, Louisiana 71101,

this ..... day of October, 1968.

.....

Benjamin C. King
of counsel for Respondent.